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HAROLD B. WILLEY, C

No. 444

IN THE

Supreme Court of the United States

October Term, 1955

BINGLER VACATION TOURS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

Appeal from the United States District Court for the District of New Jersey

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STATEMENT AS TO JURISDICTION

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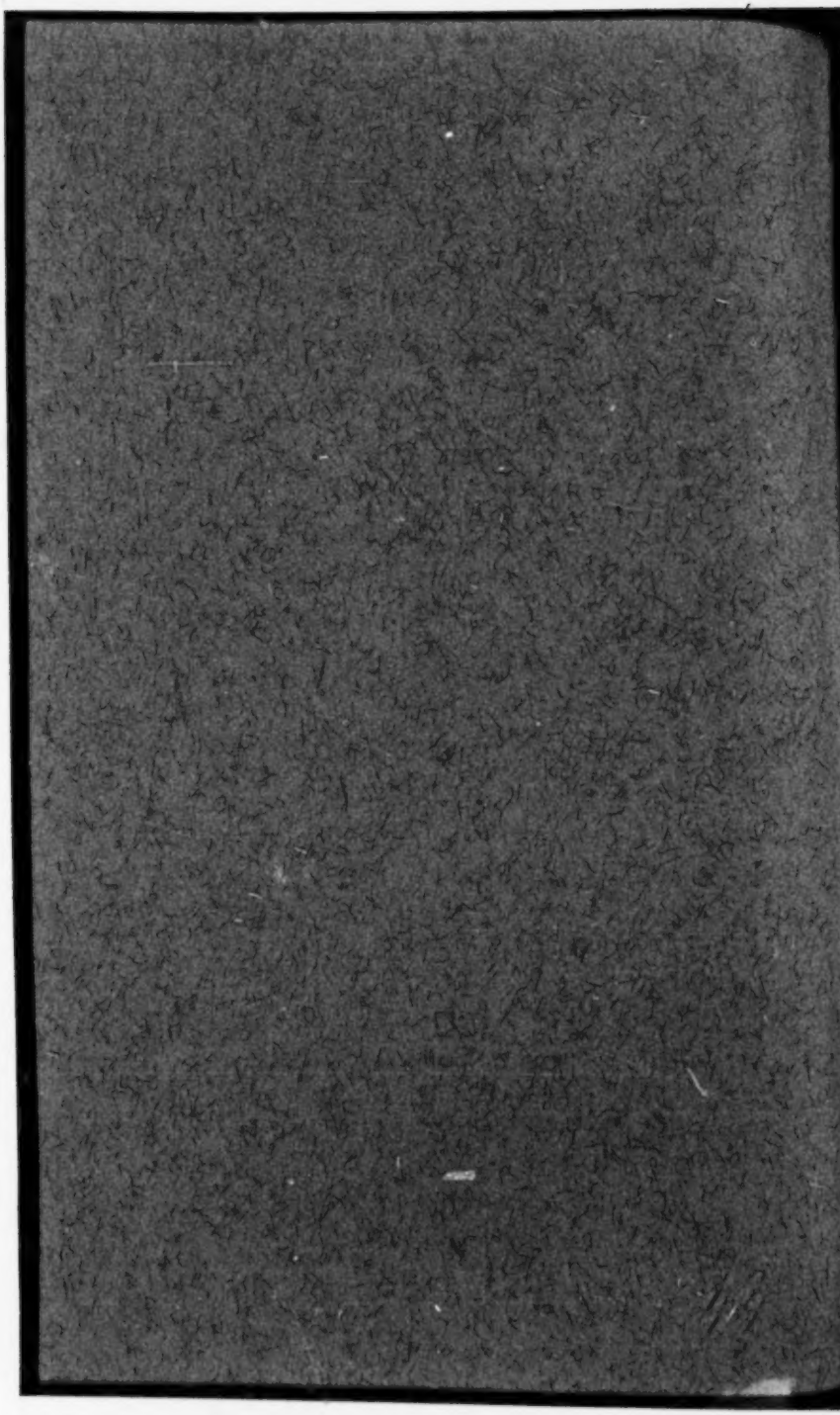


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STATEMENT AS TO JURISDICTION

Bingler Vacation Tours, Inc., appellant, hereinafter sometimes called simply Bingler, submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The final judgment of the United States District Court for the District of New Jersey, dated June 9, 1955, is attached hereto as Appendix A. The opinion of the Court, attached hereto as Appendix B, was filed on July 14, 1955. The two decisions of the Interstate Commerce Commission, hereinafter called the Commission, from which this proceeding springs, *Asbury Park-N. Y. Transit Corp.* v. *Bingler Vacation Tours,* are reported at 62 M.C.C. 731 and 62 M.C.C. 802. The latter, following oral argument before the entire Commission, is not printed in full in the permanent series of motor-carrier reports of the Commission but is set forth in full in the transcript of record in this cause prepared by the Clerk of the United States District Court for the District of New Jersey for transmission to the Clerk of the Supreme Court of the United States. In its opinion the District Court inadvertently cites this latter decision as at 62 M.C.C. 731.

BASIS OF JURISDICTION

This suit was brought by Bingler, a common carrier of passengers by motor vehicle in interstate commerce to set aside and enjoin an order of the Commission entered October 4, 1954, under section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c). The said order directed Bingler "to cease and desist, and unless and until appropriate authority therefor is obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."

The suit likewise sought to set aside an order of the Commission, entered January 17, 1955, which denied the petition of Bingler "for (1) reconsideration by the entire Commission, or, in the alternative, for institution of a general investigation and reopening of the instant proceeding for further hearing therewith, and (2) for indefinite postponement of effective date of outstanding cease-and-desist order pending such reconsideration or further hearing."

The jurisdiction of the Supreme Court of the United States to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b), and is sustained by the following cases: *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515; *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60; *American Trucking Assn.* v. *United States,* 344 U.S. 298; *United States* v. *Capital Transit Co.,* 338 U.S. 286.

STATUTES INVOLVED

The pertinent portions of Part II of the Interstate Commerce Act, 49 U.S.C. 301 et seq., are as follows:

> *Sec. 204(c), 49 U.S.C. 304(c):* Upon complaint in writing to the Commission by any person, * * * the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * *
>
> *Sec. 206(a), 49 U.S.C. 306(a):* * * * no common carrier by motor vehicle subject to the provisions

of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Whether the District Court was in error in holding that the Commission did not err as a matter of law in attempting, in *Asbury Park-N. Y. Transit Corp.* v. *Bingler Vacation Tours, supra,* to draw a distinction between the carriage of passengers in "special operations * * * in round-trip sight-seeing or pleasure tours" which involve radial or territorial grants of authority from the said Commission (the typ of authority held by appellant) and the carriage of passengers in "special operations * * * in round-trip sightseeing or pleasure tours" between specified *points* (the type of authority which the Commission had elsewhere found contemplated precisely such operations as those of appellant which were under attack before it); and

(2) Whether the District Court was in error in failing to hold that the report and order of the Commission in the said proceeding before it are vague in their terms, transcend the issues, and are therefore arbitrary and capricious.

STATEMENT OF THE CASE

The administrative proceeding which gave rise to the Commission order here under consideration was initiated by the filing with the Commission of com-

plaints by two regular-route common carriers of passengers by motor vehicle between New York City and specified points in New Jersey and Pennsylvania. By these complaints it was alleged that during stated periods of 1948 and 1949 Bingler transported passengers between New York City, on the one hand, and, on the other hand, (1) the track of the Monmouth Park Jockey Club, Inc., at Oceanport, N. J., (2) the Garden State Race Track near Camden, N. J., and (3) Asbury Park N. J., over regular routes, without authority and in violation of section 206(a) of the Interstate Commerce Act. The prayer of the complaints was for entry of an order requiring Bingler to cease and desist from the alleged violations. At no time during the course of the proceedings did the Commission intimate, or even hint, that it contemplated granting any other type or measure of relief.

So far as here pertinent, the certificate by virtue of which Bingler performed the services assailed in the two complaints authorized the carriage of passengers and their baggage, in interstate or foreign commerce, over irregular routes, in special operations, restricted to traffic originating at the points indicated, in round-trip sightseeing or pleasure tours, from points and places in Passaic, Bergen and Essex Counties, N. J., and New York, N. Y., to points and places in Connecticut, Delaware, Maine, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and the District of Columbia, and return.

The proceedings before the Commission hinged on the significance to be accorded that portion of the above authority which provides for service "over ir-

regular routes in special operations, restricted to * * * round-trip sightseeing or pleasure tours."

Following formal hearing and the customary procedural steps, the rendering of a report by Division 5 of the Commission (62 M.C.C. 731), reopening for oral argument, the hearing of oral argument before the entire Commission, and the filing of post-argument briefs, the Commission found that Bingler's *assailed* operations were without appropriate authority and in violation of section 206(a) of the Interstate Commerce Act. Appended to the report containing those findings, however, was an order by the terms of which Bingler was "notified and required, on or before November 22, 1954[1], to cease and desist, and unless and until appropriate authority therefor is obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the *character* found in said report on oral argument to be beyond the scope of the authority heretofore granted to it." (Emphasis supplied). Under date of January 17, 1955, the entire Commission denied Bingler's aforementioned petition of December 3, 1954, for reconsideration and the other described relief, whereupon Bingler filed the bill of complaint in the District Court.

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[1] The effective date of the cease-and-desist order was successively postponed by the Commission until December 20, 1954, January 31, 1955, February 10, 1955, May 10, 1955, and, finally, until June 10, 1955. As indicated, the judgment of the District Court was entered on June 9, 1955.

THE LAW DRAWS NO DISTINCTION BETWEEN AUTHORITY TO CONDUCT ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS IN A TERRITORY AND CORRESPONDING AUTHORITY BETWEEN SPECIFIED POINTS

In order to reach its conclusion that the assailed operations are beyond the scope of Bingler's certificate, the Commission attempted to draw a distinction between "special operations * * * in round-trip sightseeing or pleasure tours" which involve *radial or territorial* grants of authority, the type of authority held by Bingler, and "special operations * * * in round-trip sightseeing or pleasure tours" *between specified points,* the type of authority granted by it in the cases cited at the top of page 77 of Bingler's bill of complaint in the District Court. The Commission's reasoning on the subject (see Appendix E of the bill of complaint, pages 76 and 77) follows:

> With respect to previously decided proceedings involving territorial grants of authority in round-trip, sightseeing or pleasure tours, we note that generally there has been a genuine effort to distinguish such operations from those of the ordinary regular-route passenger carrier. (Citing and construing cases.) The *Smoky Mountain case, supra,* involved tours over a regular route between fixed termini, and the *Sevitch case,* the *Resler case,* the *Public Service case,* and the *Prue case,* all cited in footnote 5, involved operations between fixed termini and in these latter cases regardless of the other characteristics of the operations, the respective carriers obviously are free to operate between the specified points because the authority was specifically granted for that purpose. In any event, no operational analogy necessarily follows between a certificate which authorizes specified points and one which authorizes specified points

(sic) and one which authorizes territorial operations as involved herein.

From the foregoing, it is abundantly clear, that round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service. Thus, if some *substantial* accessorial or different service is not provided the operation must be classed as that of an ordinary regular-route carrier. Where the tour covers a number of points or places involving sightseeing and leisurely travel, it is not so important whether we look further to see that other extra services are apparent because an operation of that sort would on its face seem to meet the uniformly defined and commonly understood meaning of the term "tour" as heretofore described. When, however, a carrier holding tour authority on a *radial or territorial basis* undertakes to set up a tour of one day or less between two specific points it then becomes important that something extra and something substantial be added to the bare transportation involved. If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons.

We cannot understand how the Commission could come to the conclusion that the assailed operations conducted by Bingler to the named race tracks and to Asbury Park are not tours because Bingler's authority embraces a *territory* within which the origins

and destinations lie, but that identical operations become round-trip sightseeing or pleasure tours when so described in a certificate *expressly naming the origins and destinations.* Nor can we understand how the District Court, by its silence on the subject, could have accepted or condoned this faulty reasoning by the Commission. As we view it, such reasoning is strained and wholly fallacious. What the Commission did, manifestly, was to confuse the nature of the *proceeding* in which the authority has been granted with the nature of the *authority* itself. The District Court fell into damaging error by failing to recognize this.

The Court will search in vain through the Interstate Commerce Act for any support for this unnatural construction which the Commission has placed upon Bingler's certificate. Section 206(a) of the Interstate Commerce Act authorizes no distinction of any sort in the operations to be conducted under whatever type certificate may be issued by the Commission, and section 207(a) of that Act merely provides so far as here pertinent that "no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes and between fixed termini, except as such carriers may be authorized to engage in special or charter operations." It can make no possible difference that the authority issued by the Commission permits in the one instance the conducting of tours between points explicitly named while in the other instance, (as in the case of Bingler) it permits such tours in a territory embracing the very same points among others. Either the operation *is* a tour or it *is not* a tour, however broad or limited the locale; by just what process of ratiocination would a tour specifically authorized by

the Commission between named points lose its character as such because it chanced to be conducted between those same points by a carrier (Bingler) whose authority from the Commission embraced an area or territory? Obviously, we submit, such a metamorphosis as the Commission here envisages cannot be rationalized.

In its legal aspects the situation with which we are here confronted is closely akin to that considered by the Supreme Court of the United States in *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475. In *Carolina Freight Carriers Corp. Com. Car. Application*, 24 M.C.C. 305, wherein the applicant had sought authority as a common carrier by motor vehicle to transport general commodities over irregular routes between described areas, the Commission had sought, under the provisions of the "grandfather" clause of section 206(a) [49 U.S.C., sec. 306], to restrict the scope of the applicant's certificate to the carriage of a few specified commodities between given points. As a justification for this radical reduction of the applicant's authority, the Commission had the following to say at pages 308 and 309:

> * * * Furthermore, we have frequently stated that authority to transport general commodities throughout a wide territory, over irregular and unspecified routes, pursuant to the "grandfather" clauses of the act, should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. *Common carriers which are expected to maintain regular service for the movement of freight in whatever quantity offered, to and from*

all points on a specified route, cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service. * * * (Emphasis supplied)

Upon appeal from a decree of a statutory court of three judges which had set aside the order of the Commission, the Supreme Court of the United States had this to say at pages 484-486:

* * * But we conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. The difference between those types of carriers may well justify a sharp delimitation of the far flung territory which an irregular route carrier may profess to serve. But once the territory has been defined, the statutory test of whether an applicant was a "common carrier" by motor vehicle in "bona fide operation" during the critical periods is the same for the irregular and the regular route carrier. We are not confident that the Commission has approached the problem in that way. For it has repeatedly stated beginning with *Re Powell Bros. Truck Lines,* 9 MCC 785, 791, 792, that:

"Authority to transport general commodities throughout a wide territory over irregular and unspecified routes pursuant to the 'grandfather' clause of the act should be granted to a carrier only when such carrier's right thereto has been proved by substantial evidence. To do otherwise would create the very ills which regulation is designed to alleviate, namely, congestion of highways, destructive rate practices, and unbridled competition. Common carriers which are expected to maintain regular service for the movement of

freight in whatever quantities offered to and from all points on specified routes cannot operate economically and efficiently if other carriers are permitted to invade such routes for the sole purpose of handling the cream of the traffic available thereon in so-called irregular-route service."

And see *Re Merchants Parcel Delivery Co.* 21 MCC 93; *Re Langer Transport Corp.* 23 MCC 302; *Re Lett & Co.* 26 MCC 159.

In so far as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators it is erroneous as a matter of law. For facts sufficient to establish that a person is a "common carrier" by motor vehicle in "bona fide operation" in the one case are sufficient in the other. The statutory differences lie only in the territorial scope and pattern of the operation. (Emphasis supplied)

Here again, the Commission—with the approval of the District Court—is guilty of the very type of unsound reasoning which the Supreme Court of the United States condemned in the cited case. It has sought to apply one standard—a relaxed standard—to the operations conducted by the carrier which holds authority in special operations in round-trip sightseeing or pleasure tours *between specified points,* but a quite different and more rigid standard to the operations conducted by the carrier which has been operating for many years in a *territory.* This is without statutory sanction; the statute does not even imply, far less, provide, such a distinction. The Commission may not exercise one whit more than its delegated powers. *Florida* v. *United States,* 282 U.S. 194; *Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co.,* 274 U.S. 597. It cannot legislate, as it would do here.

It will be kept in mind also that it is declared to be the national transportation policy of the Congress to which all of the provisions of the Interstate Commerce Act are made subject, "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices * * *." [49 U.S.C., preceding sections 1, 301, 901, and 1001]. This decision by the Commission is a far cry from the Congressional prohibition against "unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

As we have previously pointed out to the Commission (see Appendix F of our bill of complaint), the contradictory nature of its finding here is well illustrated by a contrasting of that finding with its findings in other cases before it. In *Ted Courtney and Paul Lester Common Carrier Application,* 47 M.C.C. 885[2], the applicants sought authority to transport passengers between Mayfield, Ky., and Nashville, Tenn., in order that they might attend a particular radio show which was broadcast every Saturday night

[2] In which, incidentally, the Commission went so far as to denominate as "round-trip pleasure tours" the operations for conduct of which Courtney and Lester had sought the conventional regular-route passenger-carrying authority.

from a station in Nashville. Courtney and Lester proposed to sell individual tickets which would include the admission price to the show. The bus was to leave Mayfield every Saturday afternoon, arriving in Nashville in time for the show and returning to Mayfield immediately upon the completion of the show. No passengers were to be picked up or discharged other than at Mayfield. As indicated, Division 5 of the Commission found that "the present and future public convenience and necessity require operation by applicants as a common carrier by motor vehicle, in interstate or foreign commerce, of passengers, in special operations consisting of round-trip pleasure tours, beginning and ending at Mayfield, Ky., and extending to Nashville, Tenn., with no pickup or discharge of passengers enroute," over a described regular route. If the proceeding in question had chanced to be within the territorial scope of Bingler's certificate, it would have followed that the applicants there, *under precisely the same terminology*[3] as that appearing in Bingler's certificate, would be able to perform a service between the two specified points which the Commission would here forbid Bingler's rendering between those points. We confess that we are wholly unable to grasp reasoning so abstruse.

Another decision which illustrates and emphasizes the artificial nature of the Commission's attempted distinction is *Public Service Interstate Transp. Co. Com. Car. Applic.*, 42 M.C.C. 277, 287, wherein, under the aforementioned "grandfather" clause, authority was granted to the carrier for the transportation of passengers and their baggage in special operations, in round-

[3] Except, of course, that the word "sightseeing" was omitted.

trip sightseeing or pleasure tours from New York City for skating and ice-boating at Greenwood Lake, N. Y., the most distant point on the tour. That grant, be it noted, authorized service in the very territory in which Bingler holds the disputed authority. Under the Commission's findings here, if Public Service. Interstate Transportation Company and Bingler operated *identical* one-day trips, side by side, over the same highways, at the same time of the day, from New York City to Greenwood Lake in special operations to enable the passengers to indulge in the sports of skating or ice boating, the trip operated by Public Service Interstate Transportation Company would be a tour but the identical trip operated by Bingler would *not* be a tour. It hardly seems possible that the Commission and the District Court could have been aware of the curious result of the Commission's findings.

It is of interest,[4] too, that Quaker City Bus Company, *one of the complainants here,* holds a certificate authorizing the carriage of passengers and their baggage, in special operations, in round-trip sightseeing or pleasure tours, over irregular routes, beginning and ending at Philadelphia, Pa., or Camden, N. J. and extending to Graymoor, at Garrison, N. Y., and the United States Military Academy at West Point, N. Y., that Public Service Interstate Transportation Company holds a certificate in No. MC-3647 (Sub-No. 59) authorizing the carriage of passengers and their baggage in round-trip sightseeing or pleasure tours, over irregular routes, beginning and ending at Philadelphia, Pa., and Camden, Elizabeth, Jersey City, Newark, and Paterson, N. J., and extending to Gray-

[4] And we have previously requested the Commission to take official notice thereof.

moor, that the same carrier holds certificates in Nos. MC-3647 (Sub-Nos. 79 and 127) which authorize many services which are identical with those just named except in respect to the origins and destinations, and that in principle the services rendered by virtue of such certificates do not differ in even minor respects from those rendered by Bingler to and from Asbury Park and the race tracks. Here again, we find that under the Commission's unwarranted conclusions the very operations which constitute a round-trip sightseeing or pleasure tour for Quaker City Bus Company and Public Service Interstate Transportation Company would not be a round-trip sightseeing or pleasure tour if conducted by Bingler.

In the first decision herein (see Appendix C of bill of complaint, page 46) Division 5 found (and the entire Commission has never disavowed that finding) that the grant of authority to Bingler "is identical in form with the authority granted in numerous other cases." But in those other cases the recipients of the grants may conduct a type of operation which the Commission and the District Court will not now permit Bingler to conduct, despite this identity in form.

In support of its concurrence in the Commission's drawing of a distinction between authority to conduct round-trip sightseeing or pleasure tours in a territory and corresponding authority between specified points, this District Court has the following to say in its opinion of July 14, 1955:

> The nature of this distinction is illustrated by the decision of Division 5 of the Commission in Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, 522 (1937), discussed at length in Bingler's brief. Red Star, which op-

erated all-expense trips of several days duration through various states, also conducted one-day trips to Asbury Park and to Lake Hopatcong, New Jersey. On the basis of all of these operations Red Star was granted a territorial tour certificate. But the opinion in the Red Star case reveals that "something extra and something substantial" was added to bare transportation to Asbury Park and Lake Hopatcong. The Commission states: "Tickets are sold individually in advance for reserved seats for specific round-trip tours, with no pick-up or discharge of passengers en route. Stops are made at various points of interest, with the driver acting as a guide in instances where no guides are on duty." Thus, where something more than bare expeditious transportation characterizes the service, point-to-point operations may be conducted under a territorial tour certificate. See, *e.g.,* Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124 (1938), and Resler v. Hunter Clarkson, Inc., 41 M.C.C. 665 (1943).

But in this the District Court is in manifest error. In the *Red Star case* the Commission, in response to a late-filed "grandfather" application, granted to the applicant, Red Star, authority to operate in special operations in the conduct of round-trip sightseeing or pleasure tours beginning and ending in the Borough of Brooklyn, New York City, and extending to points in New Jersey, New York, Connecticut, Pennsylvania, Delaware, the District of Columbia, Maryland, Massachusetts, and Virginia. Obviously, *this proceeding involved a territorial grant of authority,* just as in the case of Bingler. The rates charged for Red Star tours lasting longer than one day included hotel accommodations, certain meals, admission, sightseeing and guide fees, and boat trips at points of interest; this was *not* true of the shorter tours, such as those to Asbury

Park, which latter were expressly mentioned by the Commission. In its report herein the Commission dismisses the *Red Star case* as of no consequence (notwithstanding, as stated, that it had to do with a territorial grant) because, it says, the one-day tours each week to Asbury Park were not singled out in the report as having any special significance. But certainly those tours had just as much significance as did the same tours when conducted by Bingler as a part of *its* general operations, which included a wide variety of extensive tours, in the conduct of which Bingler sold tickets in advance, made provision for reserved seats, and provided for tour conductors or guides; and we repeat—as we emphasized in our petition of December 3, 1954, to the Commission (see Appendix F of our bill of complaint, page 91)—that (1) both Red Star and Bingler specialize in schedules to Asbury Park; (2) that the pattern of Bingler's tours to and from Asbury Park was no more rigid than was the Red Star pattern, although the former's tours were more frequent; (3) that Red Star's operations to and from Asbury Park were designed to accord precisely the same "beach-type" service as are Bingler's operations to and from the same point; (4) that in its Asbury Park operations Bingler caters to the same type prospective passenger as did Red Star and that no distinction can possibly be drawn between the two carriers on the score of possible diversion of traffic from regular-route operators; (5) that both Red Star and Bingler advertise their Asbury Park tours, the only difference being that Bingler's method of advertising has been more effective; (6) that both Red Star and Bingler use unvarying departure points, Red Star's being from its office in Brooklyn and Bingler's being from one of the smaller bus terminals in New

York City; (7) that both Red Star and Bingler use substantially the same routes to Asbury Park; (8) that frequency constituted the only difference in the periodicity of service rendered by the two carriers; and (9) that Red Star, just as does Bingler, was forced to publicize the departure hour of its buses from Brooklyn to Asbury Park.

The tours to Asbury Park constitute a part of the general operations of Bingler, just as they once constituted a part of the general operations of Red Star. But in the *Red Star case* the Commission, by express reference thereto, gives to the Red Star operations to Asbury Park the blessing which it withholds from the very same operations when conducted by Bingler. The effort of the Commission and of the District Court to distinguish the Bingler certificate from the certificate issued in the *Red Star case* must surely be found futile.

THE COMMISSION'S REPORT AND ORDER ARE VAGUE IN THEIR TERMS, GO BEYOND THE ISSUES, AND ARE THEREFORE ARBITRARY AND CAPRICIOUS

As Bingler pointed out in its petition to the Commission under date of December 3, 1954 (Appendix F to the bill of complaint, page 86), the issues in the proceeding before the Commission were sharply drawn, Bingler being explicitly charged with but two sorts of illegal operations, namely, (1) those to the named race tracks and (2) those to Asbury Park. There is no other challenge of its operations. But, as we stated earlier herein, the cease-and-desist order appended to the report of October 4, 1954 (Appendix E to the bill of complaint, page 80) is not confined to the issues. It far transcends those issues. It requires, *not* that Bingler refrain and abstain from the per-

formance of the transportation expressly called in question in the complaints, but that it refrain and abstain "from the performance of *any* transportation, in interstate or foreign commerce, of the *character* found in said report on oral argument to be beyond the scope of the authority heretofore granted to it" (emphasis supplied). Bingler is left to determine unaided which, if any, of its other operations are not tours and are therefore without the scope of its certificate and which may be lawfully conducted. Yet, peculiarly enough, the Commission, so ready to cast this unreasonable and onerous burden upon Bingler, has the following to say in its said report (Appendix E to the bill of complaint, page 77):

> It is neither necessary nor would it be wise for us to undertake to name or to state the number of those additional things involving sightseeing or pleasure which a transportation service must possess to become a tour.

Thus we have the Commission, wholly unwilling or unable itself to specify the factors which constitute a given operation a tour, nevertheless forcing Bingler, with the approval of the District Court, to solve the problem under peril of the heavy penalties provided by section 222[5] of the Interstate Commerce Act (49 U.S.C., sec. 322) for willful violation of any term of

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[5] So far as here pertinent, section 222 reads as follows:

(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense.

a certificate. If this order remains in force and effect Bingler will be in danger of prosecution for doing something which is beyond the power or readiness of the Commission to define. We respectfully submit that such an order, while far too vague to permit of enforcement, would leave Bingler in an unwarranted state of uncertainty concerning the permissible scope of its future operations and is therefore void. As a concrete example of what we have in mind, if this cease-and-desist order becomes effective may Bingler continue to transport passengers from New York City in special operations to Lake Hopatcong or Graymoor (Exhibit No. 50 of the record before the Commission), there leave them to their own devices for a stated interval, and subsequently on the same day return them to New York City? Under the Commission's findings and order, Bingler is left to unrelieved conjecture. Manifestly, we submit, the District Court is in error in stating as follows in its sixth conclusion of law:

> The cease-and-desist order is not void for vagueness or indefiniteness because of its direction that Bingler abstain from the performance of any transportation of the character found in the Commission's final report to be beyond the scope of Bingler's authority under its certificate. The Commission has gone to considerable lengths in advising Bingler of the factors relevant to a determination of its rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on.

Since the Commission is a creature of statute, it goes almost without saying that it may not legally ex-

ceed its statutory powers. *Interstate Com. Com.* v. *Union P. R. Co., supra; Arkansas R. Commission* v. *Chicago, R. I. & P. R. Co., supra; Florida* v. *United States, supra.* It is immaterial that an order of the Commission may be in form within the delegated power if it is shown that, in substance, there has been a misuse or abuse of the power delegated, in which event the order must be set aside. *Interstate Com. Com.* v. *Union P. R. Co.,* 222 U.S. 541; *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* 274 U.S. 588. And the disfavor with which the Courts look upon a lack of certitude in the Commission's findings, and the promptitude with which they reject such findings has come to be a matter of common knowledge. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, for example, the Supreme Court of the United States, after reiterating its findings in prior proceedings that an order of the Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power, had the following to say:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; that it found unfairness in the old relation of parity between Brazil and Springfield; and that the new schedule in its judgment would confirm Milwaukee in the enjoyment of an undue proportion of the traffic. The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. * * * We must

know what a decision means before the duty becomes ours to say whether it is right or wrong.

One of the clearest statements of the necessity for unequivocal discussion and findings by the Commission in respect to the basic facts upon which its decisions turn is found in *Baltimore & Ohio R. Co.* v. *United States,* 22 Fed. Supp. 533, 536-7, wherein the Court, speaking through Justice Learned Hand, expressed itself in part as follows at pages 536-7:

> [2-4] We do not think that the bare finding can be made to do so much duty. The purpose of findings in such cases is to enable the courts to discharge their proper function, which is to make sure that the Commission in the discharge of its highly specialized and technical duties, has followed the statute. We have no competence to review their conclusions upon questions of rate making, so far as they involve matters peculiar to transportation; it is to the last degree desirable that we should not concern ourselves with them, as the Supreme Court has said again and again; and we cannot so confine ourselves, when the findings are equivocal. It is true that a finding in the ordinary case that a rate is reasonable may conceal interpretations of law which it will be hard to detect, but there must be some compromise as to the statement in details. That does not excuse the absence here of some statement as to the other constitutive facts necessary before a "reasonable" rate can be disregarded and a lower one substituted. In this very case, for example, we do not, and cannot know whether the Commission supposed that it was free to reduce the rates in the interest of the shippers, or regardless of the effect that the reduction would have upon the revenues of the plaintiffs, or how far they considered the interests of the southern carriers, or the water carriers. Their conclusion may have been in fact justified, but we

> have no way of knowing it, and either we should have to abdicate our duty to enforce the law as we understand it, or we should have to substitute our own conclusions upon matters which only the Commission is fitted to consider. The Supreme Court has been increasingly insistent upon the necessity of findings upon the pivotal facts. The defendant says that in Florida v. United States, 292 U.S. 1, 54 S. Ct. 603, 78 L.Ed. 1077, the Commission's very jurisdiction to regulate intrastate rates hinged upon a finding that they directly affected interstate rates; and that here no jurisdictional facts are at issue. "Jurisdiction" is a treacherous word; we are not clear that the Commission's jurisdiction is not involved; but in any event in United States v. Baltimore & Ohio R.R., 293 U.S. 454, 464, 55 S. Ct. 268, 272, 79 L.Ed. 587, it was expanded to "quasi-jurisdictional" which was meant to cover all "indispensable" facts; and in United States v. Chicago, Milwaukee, St. Paul & P. R.R. Co., 294 U.S. 499, 504, 55 S. Ct. 462, 464, 79 L.Ed. 1023 the phrase, "basic or quasi-jurisdictional facts" was substituted, as in Morgan v. United States, 298 U.S. 468, 480, 56 S. Ct. 906, 911, 80 L.Ed. 1288. What findings are "basic" is a practical matter; those are such which we need to ascertain on what legal theory the Commission has proceeded; they are absent here, and we think that for this reason the two orders are invalid and should be set aside.

In holding in *Florida* v. *United States, supra,* that orders of the Commission which lack the support of proper findings cannot be sustained by the Courts, the Supreme Court of the United States expressed itself as follows at page 215:

> The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination,

> to the importance of which this court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24. 1930, 282 U.S. 74, ante, 221, 51 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.

The decisions thus literally cry out for the setting aside of orders such as this. How, in all fairness, can a defendant, in the language of *United States* v. *Chicago, M. St. P. & P. R. Co., supra,* be required by the Commission "to spell out, to argue, to choose between conflicting inferences" in order to determine what it may or may not do in the way of transportation? The inability or unwillingness of the Commission to delineate the elements which do not constitute a tour, as that term is used in Bingler's certificate, completely destroys the effectiveness of its findings in respect to the directly assailed operations as well as the effectiveness of the order directed to "transportation * * * of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it"; obviously, we submit, the Commission and the District Court have been guilty of confused thinking which demands condemnation by this Court.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Exhibit No. 31 in the record before the Commission (now a part of the District Court record transmitted to the Supreme Court of the United States) discloses that between May 1, 1948, and September 30, 1948, $62,378.50, out of a total income of $77,893.90, was derived by Bingler from race-track operations. Exhibits 53, 54, and 55 and pages 392-3 of the same record show that during the periods embraced within the complaints Bingler operated a total of 789 trips to the Monmouth Park Race Track, to the Garden State Race Track, and to Asbury Park, at revenue per passenger ranging from $1.75 to $3.25. Thus the importance of this proceeding and the substantiality of the questions presented are self-evident.

There is the further fact that many, many motor common carriers of passengers hold certificates from the Commission authorizing special operations in round-trip sightseeing or pleasure tours, as evidenced by the fact that under date of February 1, 1954, pursuant to authority granted at the oral argument, Bingler submitted to the Commission a list of eighty such carriers, whose authority, in toto, fairly blankets the United States. A great many of them hold territorial or radial authority of the very sort held by Bingler. The question of the type of service which these carriers may render under these certificates is palpably of the greatest importance; they should not be left in doubt, as they will be left unless this Court exercises its good offices to make certain what is now vague and uncertain.

CONCLUSION

It is earnestly submitted that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day made service of the foregoing Statement as to Jurisdiction upon all parties of record by mailing by first-class mail a copy to each of the following attorneys:

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Dated at Washington, D. C., this 3rd day of October, 1955.

WILMER A. HILL

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 111-55

BINGLER VACATION TOURS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA ET AL., *Defendants*.

Findings of Fact and Conclusions of Law

Findings of Fact

1. Plaintiff, Bingler Vacation Tours, Inc., hereinafter referred to as Bingler, is a corporation, and is a common carrier of passengers by motor vehicle in interstate commerce.

2. Bingler holds a certificate of public convenience and necessity issued by the Interstate Commerce Commission which, among other things, authorizes Bingler to operate as a motor common carrier in the transportation of passengers over irregular routes, in special operations, in round-trip sightseeing or pleasure tours, from New York City and points in three nearby New Jersey counties to points in New Jersey and 13 other eastern states and the District of Columbia.

3. By complaints filed with the Commission in 1949, two of Bingler's competitors, Asbury Park-New York Transit Corporation and Quaker City Bus Company, alleged that Bingler was engaged in the transportation of passengers by motor vehicle in interstate commerce over regular routes (a) between New York City and Asbury Park, N. J., (b) between New York City and the Monmouth Park race track at Oceanport, N. J., and (c) between New York City and the Garden State Race Track, near Camden N. J.; that Bingler was without authority to enage in such interstate operations; and that the complainants, respectively,

were authorized, under certificates of public convenience and necessity issued by the Commission, to engage in such operations, and were engaged therein. The complainants asked for investigation by the Commission of the alleged violations by Bingler, and for orders requiring Bingler to cease and desist therefrom.

4. The two complaints were heard jointly before a hearing examiner of the Commission. Evidence was offered by the complainants, by Bingler, and by numerous intervenors. Subsequent proceedings included the examiner's recommended report, exceptions thereto, a report by Division 5 of the Commission, petitions for reconsideration, oral argument before the entire Commission, post-argument briefs, and the Commission's final report, the latter being dated October 4, 1954, being reported at 62 M.C.C. 731, and being accompanied by a cease-and-desist order directed against Bingler. Bingler thereafter filed a petition for reconsideration and for reopening of the proceeding. The Commission denied this petition by order dated January 17, 1955.

5. In its final report the Commission made the following evidentiary or subsidiary findings, among others:

> (a) Since January 5, 1947, Bingler has published tariffs which provide round-trip fares for "round-trip, sightseeing or pleasure tours" from points in the origin territory to those in the States named in its certificate. A section of the tariff entitled "Sightseeing Tours" includes fares on round trips to the points here in question, among many other specific points, indicating that they are of one day's duration. Round-trip tickets were sold by Bingler for transportation from New York City to the Monmouth Park track and Asbury Park, and return, during 1948 and 1949, and from New York City to the Garden State track and return during 1949. Transportation to the tracks was provided during racing meets which were held during the period specified in the complaints, and during the summer season to Asbury Park.

Bingler's tickets are sold at a bus terminal in New York City which facilities are used by many regular-route passenger carriers. Tickets issued in 1948 by Bingler bear its name and are in 2 sections; 1 part is valid for the outbound transportation from New York City to either the Monmouth Park track, Garden State track, or Asbury Park, and the second portion for the return trip. They are marked "1 day excursion," and "good only on special excursion motor coaches." In 1949, a more elaborate ticket was used to the Monmouth Park track and Asbury Park. It is marked "sightseeing and pleasure trip." The return portion of the ticket notifies patrons that buses return to the New York City terminal, the point of departure. The Monmouth Park track ticket bears the additional information that the last bus leaves the park 15 minutes after the final race. In no instance does the price of the ticket include any service other than transportation, nor is any guide or conductor provided.

(b) Various forms of advertising are employed by Bingler to inform the public of its track and Asbury Park service. Handbills or throwaway advertisements declare "special direct buses" for Monmouth Park racetrack leave the New York City terminal at a certain time daily, Monday through Saturday, returning after the last race. A brochure distributed in 1949 detailing data about the Monmouth track advertises Bingler's operation as "frequent bus service starting at 11:15 and to 12:00 noon." Newspaper advertisements apprise the public that Bingler offers direct bus service to Monmouth Park racetrack, "daily 11:15 a.m. to noon." Practically identical handbills advertise Bingler's service to the Garden State racetrack; newspaper inserts inform the public that service from the terminal is daily at 10:30 a.m. and that Bingler provides "the only non-stop express buses from N.Y.C." Throwaway handbills advertise Bingler's Asbury Park operation, also, informing the public that the service is a "special bus trip," that the ride is scenic, over roads not used by public transportation facilities, and that a 6-hour stop is made at Asbury Park. Buses leave the New York City terminal daily, except Sundays and holidays, at 10 a.m., and leave Asbury Park about 6:30 p.m. The handbills declare that Bingler

reserves the right to cancel trips when necess
Newspaper advertisements bear the name of the
minal company whose facilities are used by Bin
and which acts as an agent of Bingler and ot
motor carriers in the sale of tickets. They advise
there is a daily, except Sunday, operation to Asb
Park leaving New York City at a certain time. Ot
operations offered by Bingler are a part of the s
advertisement including 1 to Lake Hopatcong, N.
on Saturdays only, 1 to Graymoor, a religious sh
near Garrison, N. Y., operated on Sundays only,
a "Mystery Frolic" on Saturdays. Departure ti
are advertised on these other operations also.

(c) From June 21 through August 7, 1948, Bin
operated 325 round trips to Monmouth Park r
track, with as many as 30 trips in a single day. It
erated 42 days during this period, thus averaging
trips a day. From June 17 to August 10, 1949, a t
of 285 round trips were made to the same track,
erating 47 days, an average of 6 trips daily. F
May 3 through May 30, and from October 3 thro
November 1, 1949, Bingler operated 72 round trip
Garden State racetrack on 50 separate days, or ab
1.4 trips daily. The maximum number of trips
erated in any single day to and from this tr
was four. From August 5 to September 26, 1
Bingler operated 36 days making 55 round trips
Asbury Park, or an average of 1.8 trips a day; dur
1949, it operated 1 day in April, 20 in July, 20
August, and 6 in September to Asbury Park. Dur
a 5-month period in 1948, Bingler derived about $
000 or about 40 percent of its gross revenue from
Monmouth track operation.

6. Based upon the foregoing subsidiary findings,
after considering the opinions of witnesses introduced
experts on the subject of what constitutes "tour servic
and after considering numerous dictionary definitions
the words "tour" and "excursion," the Commission fo
and concluded:

(a) That "round-trip sightseeing or pleasure to
in special operations, which involve radial or te

torial authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points, which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service;"

(b) That: "If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons;"

(c) That: "Otherwise, a carrier holding such authority, without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certificate and contrary to the public interest and the national transportation policy;"

(d) That "neither the racetrack operations nor the Asbury Park operations [conducted by Bingler] are anything more than bare expeditious round-trip passenger transportation between specified points, and [both] are beyond the scope of [Bingler's] authority which is restricted to round-trip sightseeing or pleasure tours"; and

(e) That an order should be entered directing Bingler to cease and desist from the performance of any transportation of the character found in the report to be beyond the scope of its authority.

7. The Commission thereupon entered such a cease-and-desist order directed against Bingler, and subsequently denied Bingler's petition for reconsideration and rehearing. Those are the two orders which Bingler assails in the suit at bar and which it prays the court to annul and set aside.

Conclusions of Law

1. The court has jurisdiction over this cause of action and the parties hereto.

2. The proceedings here sought to be reviewed were within the scope of the Interstate Commerce Commission's statutory authority.

3. The findings of fact made by the Interstate Commerce Commission are supported by substantial evidence in the whole record.

4. The Commission made clear and adequate findings upon the pivotal facts, and the theory upon which it decided the case is clearly set forth in its report, thereby affording a rational basis for its ultimate finding and conclusion that Bingler's operations between New York City and Asbury Park and between New York City and the two New Jersey racetracks are not within the scope of Bingler's operating authority and therefore are unlawful, and that Bingler should cease and desist therefrom.

5. The conduct of bare expeditious transportation operations between two specified points within its broad territory by the holder of a radial, territorial, "tour" certificate such as that of Bingler would contravene:

(a) the provisions of Sections 206 and 207(a) of the act.

(b) the duty of the Commission, under Section 208(a) to specify in the certificate the service to be rendered and the termini between which, if any, operations are authorized.

6. The cease-and-desist order is not void for vagueness or indefiniteness because of its direction that Bingler abstain from the performance of any transportation of the character found in the Commission's final report to be beyond the scope of Bingler's authority under its certificate. The Commission has gone to considerable lengths in advising Bingler of the factors relevant to a determination of its

rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on.

7. Denial of Bingler's petition for reconsideration and for reopening of the proceeding was a matter within the Commission's sound discretion, and no abuse of that discretion appears. Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514; United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535.

8. The Commission's orders are not unlawful, as alleged by the plaintiff (Bingler), and its complaint should be dismissed.

By the Court,

/s/ JOHN BIGGS, JR.
United States Circuit Judge.

June 9th, 1955.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 111-55

BINGLER VACATION TOURS, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*.

Before BIGGS, *Circuit Judge*, and MODARELLI and HARTSHORNE, *District Judges*.

Opinion

By BIGGS, *Circuit Judge*.

The plaintiff, Bingler Vacation Tours, Inc., is a New Jersey corporation and holds Certificate of Public Convenience and Necessity No. MC 599 issued by the Interstate Commerce Commission on March 3, 1948. The certificate authorizes Bingler to engage in transportation in interstate and foreign commerce as a common carrier by motor vehicle subject to the following specifications: "Irregular Routes: Passengers and their baggage, in special operation restricted to traffic originating at the points indicated in round-trip sightseeing or pleasure tours, from points and places in Passaic, Bergen and Essex Counties, N.J., and New York, N.Y., to points and places in Connecticut, Delaware, Maine, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Penn-

sylvania, Rhode Island, Tennessee, Vermont, Virginia, and the District of Columbia, and return. Restriction: The service authorized above is subject to the following conditions: No passenger shall be picked up at any point not within the above-described base territory who has not purchased a round-trip tour ticket. Except in the case of a bona fide stop-over from one tour to a succeeding tour, no passenger shall be discharged at any point outside the described base territory other than the point of origin of that particular passenger." Section 207(a) of the Interstate Commerce Act, 49 USCA § 307(a), authorizing the issuance of the necessary certificate to engage in interstate transportation whenever the present or future public convenience and necessity so requires, contemplates the type of certificate issued to Bingler by providing "That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

Among the operations conducted by Bingler under this certificate were bus services between New York City and three locations in New Jersey. Bingler offered one of these services between New York City and the horse racing track of the Monmouth Park Jockey Club, Oceanport, New Jersey, during the racing season of 1948 and 1949. A similar service was offered between New York City and the Garden State Race Track during the season of 1949. Bingler published tariffs which listed these operations as "Sightseeing Tours" and advertised the services as "Special Direct Buses." The tickets for the trips which were sold at the New York bus terminal whose facilities were used by Bingler were marked "1 day excursion," "good only on special execursion motor coaches," and "sightseeing and pleasure trip." The price of the tickets included only the tranportation service. Bingler buses left the New York City terminal in time to reach the tracks before the

first race. Direct routes were used; no guides were employed and only short rest stops were made. The passengers were discharged at the entrance to the tracks and shortly after the last race the buses returned in the same manner to New York City.

Bingler also operated a bus service between New York City and Asbury Park, New Jersey, a beach resort, during the summer months of 1948 and 1949. The service was substantially similar to that operated to the race tracks except that in going to Asbury Park an indirect route along the sea coast was used. The trip was advertised as a "scenic tour of the North Jersey coast that provides the tourist with long-remembered vistas of a seascape and landscape, along with a five hour stop at Asbury Park." On arrival at Asbury Park, passengers were discharged at a point along the beach, left to their own pursuits, and then returned directly to New York City in the evening.

In 1949, Asbury Park-New York Transit Corporation, a common carrier authorized to operate regular service between New York City and Asbury Park and the Monmouth track, filed a complaint with the Interstate Commerce Commission alleging that the Asbury Park and Monmouth operations of Bingler were unauthorized and were therefore in violation of Section 206(a) of the Interstate Commerce Act, 49 USCA § 306(a), requiring authorization by certificate for interstate common carriage. I.C.C. No. MC-C-1047. In 1949, Quaker City Bus Company, certified to conduct regular service between New York City and the Garden State track, also filed a complaint charging that Bingler's Garden State service was unauthorized and violative of the Act. I.C.C. No. MC-C-1070. A number of common carriers of passengers and the National Bus Traffic Association intervened in support of the complaints. The cases were consolidated and heard by an examiner of the Commission who recommended that Bingler be ordered to cease and desist from the operations in issue. Division 5 of the Commission then con-

sidered the case and found that Bingler's race track services were unauthorized but that the Asbury Park operations were within the scope of its certificate. After petitions for reconsideration, the entire Commission heard argument and on October 4, 1954 issued its report and order. 62 M.C.C. 731.

In answer to the argument of the complainants that Bingler's earlier operations upon which its certificate was granted under the "grandfather" provisions of Section 206(a) of the Interstate Commerce Act, 49 USCA § 306(a)(3), should be considered in construing the scope of the Bingler certificate, the Commission stated at sheets 15 and 16 of its report: "In view of the conclusion that the meaning of the term 'special operations in round-trip sightseeing or pleasure tours' is established and that there is no ambiguity in defendant's certificate it follows that we are not warranted in going behind defendant's certificate and considering the operations upon which it was granted."

In construing Bingler's grant of authority, the Commission said at sheet 17 of the report: "We conclude that the operations complained of, both those to and from the race tracks and those to and from Asbury Park, might fall within the term 'special operations,' but in view of the other more important restrictive language in defendant's certificate we do not believe this conclusion to be especially significant." After considering the restrictive language of "round-trip sightseeing or pleasure tours" contained in Bingler's certificate, the Commission concluded at sheet 24 that "round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points which factor is the fundamental characteristic of ordinary regular-route passenger-carrier service."

The Commission then held Bingler's race track and Asbury Park operations to be no more than "bare expeditious

transportation between two points." An order was entered "That defendant Bingler Vacation Tours, Inc., be, and it is hereby notified and required, on or before November 22, 1954, to cease and desist, and unless and until appropriate authority therefor it obtained, thereafter to refrain and abstain, from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."

A subsequent petition of Bingler for reconsideration or, in the alternative, for further hearing incident to a general investigation was denied by the Commission. The effective date of the cease and desist order was subsequently postponed by the Commission until June 10, 1955. In the meantime, Bingler filed its complaint in this case under 28 USC § 2321 *et seq.* seeking an order setting aside the action of the Commission. A three-judge district court was constituted according to 28 USC § 2284. A number of petitions to intervene in support of the Commission's order were filed by those who had been parties before the Commission and were allowed in accordance with 28 USC § 2323. A hearing was conducted on May 27, 1955, and prior to the effective date of the Commission's cease and desist order, an order of this court dismissing the complaint was filed along with a per curiam opinion and the findings of fact and conclusions of law.

Section 207 of the Interstate Commerce Act, 49 USCA § 307, anticipates, as the Commission pointed out at sheets 13 and 14 of its report, that certificates might be granted for three distinct types of motor carrier service: for operations over "regular route or routes, and between fixed termini," for "charter" operations, and for "special" operations. Although these admittedly are broad categories, they are meaningful and the certificate issued to Bingler clearly falls with in the category of "special" operations. The problem in this case is to determine just what types of special operations Bingler was authorized to carry on

by its certificate. Since we agree with the Commission that Bingler's certificate is not ambiguous, that can be done properly only by construing the language of the certificate itself.

Bingler's certificate authorizes it to carry over "Irregular Routes: Passengers and their baggage, in special operation restricted to traffic originating at the points indicated in round-trip sightseeing or pleasure tours, From [certain] points and places . . . to points and places in [a number of states] . . . and return." We think that such words ordinarily require a carrier to conduct more than "bare expeditious transportation between two points" —to employ the Commission's own phrase. We must concede, however, that "bare expeditious transportation between two points" in some instances may be deemed to constitute a pleasure tour. For example, where a motor carrier transports passengers from a populated area to a shrine or recreation area, the service afforded might reasonably be thought of as a pleasure tour. The Commission has so regarded such service by granting pleasure tour certificates to carriers offering this type of transportation. See *e.g.*, Smoky Mountain Tours Co., Common Carrier Application, 10 M.C.C. 127 (1938); Bowen Motor Coaches Common Carrier Application, 22 M.C.C. 691 (1940); and Taylor Common Carrier Application, 27 M.C.C. 550 (1941).

In the cases cited, however, each carrier was specifically authorized to operate its pleasure tour between fixed termini, so that bare expeditious transportation was contemplated as a characteristic of the service. But Bingler's certificate was not a grant of authority to operate between fixed points but an authorization to conduct over irregular routes "round-trip sightseeing or pleasure tours, from points and places in" three New Jersey Counties and New York City "to points and places in" a number of states. The Commission has described this as a radial

or territorial grant of authority and we agree with the Commission that bare expeditious transportation was not contemplated and is not permissible under it.

As the Commission has pointed out, such a ruling does not mean that a carrier holding a radial or territorial tour certificate may not under certain circumstances operate primarily between two points. But when such service is undertaken, it must involve something more than bare expeditious transportation. The Commission explained this clearly at sheet 24 of its report, saying: "When, however, a carrier holding tour authority on a *radial or territorial basis* undertakes to set up a tour of one day or less between two specific points it then becomes important that something extra and something substantial be added to the bare transportation involved. If regularity, frequency, and expeditious service are introduced as additional factors in such point-to-point operation, then progressively it becomes even more important that these characteristics of an ordinary passenger operation not predominate in the service which is offered and provided to its patrons."

The nature of this distinction is illustrated by the decision of Division 5 of the Commission in Red Star Sightseeing Line, Inc., Common Carrier Application, 1 M.C.C. 521, 522 (1937), discussed at length in Bingler's brief. Red Star, which operated all-expense trips of several days duration through various states, also conducted one-day trips to Asbury Park and to Lake Hopatcong, New Jersey. On the basis of all of these operations Red Star was granted a territorial tour certificate. But the opinion in the Red Star case reveals that "something extra and some thing substantial" was added to bare transportation to Asbury Park and Lake Hopatcong. The Commission states: "Tickets are sold individually in advance for reserved seats for specific round-trip tours, with no pick-up or discharge of passengers en route. Stops are made at

various point of interest, with the driver acting as a guide in instances where no guides are on duty." Thus, where something more than bare expeditious transportation characterizes the service, point-to-point operations may be conducted under a territorial tour certificate. See, *e.g.*, Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application, 8 M.C.C. 124 (1938), and Resler v. Hunter Clarkson, Inc., 41 M.C.C. 665 (1943).

Since Bingler must rely upon the language of its certificate in making its plans and investments, it is important that the language be clear and definite. As we have said, we think that the Bingler certificate is clear and that the Commission's interpretation of the certificate is the proper and reasonable one. The action of the Commission in prior cases indicates the pattern followed by the Commission in this case in distinguishing between point-to-point tour certificates and territorial tour certificates and between allowable and prohibited point-to-point service under a territorial certificate. Moreover, by classifying special operational certificates along these lines, the Commission is acting within its powers in furtherance of a legitimate purpose. In certain situations, certification for expeditious point-to-point tour service may be warranted either because there is no ordinary regular-route service or because there is a need to supplement the regular service. In other situations, where there is adequate expeditious point-to-point service, it may be necessary to allow only territorial tour operations. "Otherwise," as the Commission has said at sheet 25 of its report in the instant case, "a carrier holding such authority, without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certifi-

cate and contrary to the public interest and the national transportation policy."

It is our conclusion that Bingler's territorial tour certificate did not authorize it to conduct the bare expeditious service which it operated between New York City, on the one hand, and Monmouth, Garden State, and Asbury Park, on the other. Although the most direct route was not used by Bingler on the out-bound trip to Asbury Park, we do not think this was sufficiently significant to change the expeditious nature of that service. The order of the Commission prohibiting these operations must therefore be sustained.

Bingler argues that by prohibiting it from performing "any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it," the Commission has gone beyond the scope of this case and placed Bingler in the dilemma of assessing the legality of its other carrier operations at the risk of contempt proceedings. But the hardship on Bingler seems slight for the Commission explained the criteria of proper territorial tour service clearly and adequately in its report. Moreover, the repetition of similar prohibited conduct in like situations may be anticipated and enjoined along with the particular operations in issue in this case. See Brady Transfer & Storage Co. v. United States, 80 F. Supp. 110, 118 (S.D. Iowa 1948), aff'd 335 U.S. 875 (1948). Cf. Consolidated Flower Shipments, Inc. v. Civil Aeronautics Board, 213 F. 2d 814, 818 (9 Cir. 1954), and Schauffler v. United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry, 218 F. 2d 476, 480 (3 Cir. 1955).

Bingler also complains of the denial of its petition to the Commission to reopen the case or to institute a general investigation but these were matters which rested within the discretion of the Commission. See Interstate

Commerce Commission v. Jersey City, 322 U.S. 503, 514-519 (1944) and United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535 (1946). We cannot say that the Commission abused its discretion in denying the relief sought.

Findings of fact were filed by this court on June 9, 1955, as were conclusions of law. What we have said in this opinion supplements those findings and conclusions. Bingler's complaint was dismissed by an appropriate order on June 9, 1955.

Motion to Affirm

NOV 2 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 444

BINGLER VACATION TOURS, INC.,
Appellant

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellees,

And

ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC. AND NATIONAL BUS TRAFFIC ASSOCIATION, INC.,
Intervenor-Appellees

On Appeal from the United States District Court for the District of New Jersey

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Intervenor-Appellees

On Appeal from the United States District Court for the District of New Jersey

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MOTION TO AFFIRM

Intervenor-appellees move, pursuant to Rule 16, Par. 1(c) of the Revised Rules of the Supreme Court of the United States, that the judgment of the court below be affirmed, on the ground that it is manifest that

the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

NATURE OF THE CAUSE

This is a direct appeal from a judgment, entered June 9, 1955 and reported at 132 F. Supp. 793, of a three judge District Court for the District of New Jersey, convened pursuant to 28 U.S.C. 2284 and 2325, dismissing appellant's complaint, which sought to set aside an order of the Interstate Commerce Commission. The latter order, reported at 62 M.C.C. 731, ordered appellant to cease and desist from operations of the character found unlawful in the Commission's report.

INTERVENOR-APPELLEES

Intervenor-Appellees Asbury Park-New York Transit Corp. and Quaker City Bus Company filed the original complaints to the Interstate Commerce Commission from which the cease-and-desist order emanated. They participated as complainants in all proceedings before the Interstate Commerce Commission and as intervenor-defendants before the court below. The operations which appellant was ordered to cease, were in direct competition with the certificated regular-route operations of those intervenor-appellees.

Intervenor-Appellees Hudson Transit Lines, Inc. and National Bus Traffic Association, Inc. participated in all proceedings before the Interstate Commerce Commission as intervenors, and in proceedings before the court below as intervenor-defendants.

THE CASE BELOW

Appellant's certificate authorizes the transportation of passengers over irregular routes in special opera-

tions, "restricted to traffic originating at the points indicated in round trip sightseeing or pleasure tours", from New York City and three New Jersey counties through fifteen Eastern states.

Appellant's operations which were found to be unlawful by both the Commission and the Court below, consisted of daily, scheduled, expeditious, nonstop, operations over direct routes (a) between the fixed termini of New York City and Asbury Park, New Jersey during the summer season, (b) between the fixed termini of New York City and Monmouth Park race track, near Asbury Park, during the periods when racing meets were there in session and (c) between the fixed termini of New York City and Garden State race track during the periods when racing meets were there in session. Appellant's buses departed from New York City at a fixed hour in the morning and from the other terminus at a fixed hour in the evening, in each case virtually simultaneously with identical schedules of intervenor-appellees over essentially the same route. During the periods in question, these were virtually the only individual-ticket operations conducted by appellant, despite its authority to conduct individual-ticket operations through a 15-state territory.

The details of the operations, as found by the Commission and the Court below, are summarized in Finding of Fact No. 5 of the Court below. The Commission also found, and appellant does not deny, that the operations in issue were ordinary, bare, expeditious transportation between fixed termini, identical in every essential with the certificated regular route operations of intervenor-appellees which they duplicated. (See Finding of Fact No. 6 of the Court below.)

Appellant's certificate was issued by the Commission pursuant to the exception to the proviso of Section 207(a) of the Motor Carrier Act (49 U.S.C. 307(a)) which reads:

> "*Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations."

The issue before the Commission was whether that certificate, restricted by its terms to radial irregular-route sightseeing or pleasure tours through the 15-state territory, authorizes operations of the character described above.

The Commission interpreted appellant's certificate as not including authority to conduct ordinary, bare, expeditious transportation between fixed termini, for the reason that a contrary interpretation would:

(a) Contravene the "uniformly defined and commonly understood meaning of the term 'tour' " (62 M.C.C. 745),

(b) Render futile the prohibitory proviso of Section 207(a), quoted above,

(c) Violate the purport of the limitations in the certificate (62 M.C.C. 746), and

(d) Destroy certificated regular-route service, contrary to the public interest and the National Transportation Policy (62 M.C.C. 746).

The Court below, in dismissing the action to set aside the Commission's decision, affirmed those findings.

QUESTIONS RAISED BY THE APPEAL

The only questions raised by appellant's Statement As To Jurisdiction are:

1. Whether the Commission's report and order are rendered invalid as a matter of law by the fact that the Commission distinguishes cases involving applications for *regular-route* and *fixed-termini* certificates on the ground that no operational analogy necessarily follows between such a certificate and the *irregular-route territorial* certificate here in issue (62 M.C.C. 745).

2. Whether the cease-and-desist order is invalid for vagueness and indefiniteness in prohibiting operations "of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it".

ARGUMENT

1. Appellant contended before the Commission that certain decisions granting regular-route and fixed-termini tour certificates required a determination that the operations described above were within the scope of appellant's certificate. The Commission overruled that contention, observing that the instant case involved only the interpretation of a *radial, territorial, irregular route tour certificate* as applied to specific facts, which, in turn, were found to compel the conclusion that the operations complained of were nothing more than bare expeditious round-trip passenger transportation between the specified points, that a certificate between fixed termini contemplates concentration on operations between those two points (as distinguished from operations through a *territory*), and that "no operational analogy necessarily follows" between the authority granted in a *territorial* type of certificate

and those permissible under a *regular-route* or *fixed termini* certificate. (62 M.C.C. 745, 746).

Appellant now construes those observations as (a) drawing an invalid distinction, (b) erroneously applying different legal standards, and (c) holding that the operations found to be outside its certificate would be lawful under a fixed-termini tour certificate (Statement As To Jurisdiction pp. 7-19).

Appellant's construction raises a fictitious issue which is without substance or materiality in the determination of this cause. In the first place, the only certificate before the Commission in this proceeding, and the only certificate interpreted by it, is the territorial type of certificate held by appellant. The Commission's determination of the limitations upon the type of *certificate here in issue,* as applied to the *operations here in issue,* stands upon its own feet. It was not necessary to that determination that the Commission interpret any other type of certificate, or consider operations factually different from those in issue. Any interpretation of fixed-termini certificates in this proceeding would have been mere *obiter dictum,* and would not have affected appellant nor have been binding upon any carrier.

Second, appellant's contention, that no valid distinction exists between the pattern of operation permissible under regular-route and fixed-termini tour certificates and the pattern permissible under irregular-route territorial tour certificates, is contrary to the long-settled law, as pronounced by this Court.

United States v. *Maher,* 307 U.S. 148, 155

The very case relied upon by appellant,

United States v. *Carolina Freight Carriers Corporation,* 315 U.S. 475, 486

recognizes the statutory differences in the "pattern of the operation" between territorial and fixed-termini certificates.

See also, *Falwell* v. *United States,* 69 F. Supp. 71, 77, affirmed 330 U.S. 809;

Brady Transfer & Storage Co. v. *United States,* 80 F. Supp. 110, affirmed 335 U.S. 875;

Crescent Express Lines v. *United States,* 320 U.S. 401

Third, the Commission did *not* hold that operations identical with those complained of could be conducted lawfully under fixed-termini tour certificates. It clearly avoided any such determination on the ground that "no operational analogy necessarily follows" between regular-route or fixed termini certificates and the irregular-route territorial certificate here in issue (62 M.C.C. 745).

It is true that the Commission observed that the fixed-termini tour cases contemplated that such carriers operate between the termini granted, but it did not thereby imply that those carriers were authorized to conduct any operations other than *bona fide* tours between those termini, or that the operations *here involved* constituted *bona fide* tours. On the contrary, as indicated by the Commission (62 M.C.C. 745), the operations here found unlawful are clearly not within "the uniformly defined and commonly understood meaning of the term 'tour' ", which the report discusses at 62 M.C.C. 743. Although a valid distinction exists between the two types of tour certificates, that fact is immaterial to the present case. Appellant's

operations would not be lawful or permissible even under a fixed-termini tour certificate.

Cf. *Harold L. Lesh, Common Carrier Application,* I.C.C. Docket No. MC-97122 (Sub No. 2) Decided June 30, 1955.

Since the question raised by appellant is unsubstantial, the issue is merely whether the Commission properly interpreted its own certificate. The opinion of the Court below and its Findings of Fact and Conclusions of Law demonstrate that no substantial question exists in this respect. It is fundamental that the interpretation of its own certificate is peculiarly within the province of the Commission.

> *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, aff'd. 324 U.S. 824;
>
> *Malone Freight Lines* v. *United States,* 107 F. Supp. 946, aff'd. 344 U.S. 925

The basis of that interpretation is clearly correct. As found by the Commission and the Court below, Section 207(a) expressly forbids the granting of irregular-route passenger carrier certificates, except for special or charter operations. If an irregular-route, special-operation tour certificate, such as that here in issue, should be interpreted as authorizing ordinary, scheduled, bare expeditious transportation between points—i.e. the precise type of operation contemplated by *regular route* certificates,—that prohibition would become futile. Moreover, as further found by the Commission and the Court [Finding of Fact No. 6(c)], if carriers with such broad irregular-route territorial authority can concentrate at will upon the basic traffic of the regular route carriers in ordinary, day-to-day,

bare, expeditious transportation, in the manner indulged in by appellant, the destruction of dependable regular-route service is inevitable, thereby defeating the public interest, the purpose of the Act, and the National Transportation Policy. An interpretation having the foregoing effects cannot be a correct interpretation.

It is implicit in the prohibitory proviso of Section 207(a) that the pattern of service authorized in any passenger certificate over irregular-routes be specified in such a way as to preclude the chaotic and destructive effect which must follow from the provision of ordinary regular-route service thereunder. That purpose represents the statutory standard, which the Commission found to have been uniformly applied in numerous cases (62 M.C.C. 744).

That purpose can be accomplished in many ways, even in limitations upon the size or type of equipment to be used.

> *Crescent Express Lines, Inc.* v. *United States,* 320 U.S. 401

In appellant's certificate, the Commission used the restrictive words "round-trip sightseeing or pleasure tours" as the differentiating specification to meet the standard of preventing the holder from using the certificate as if it were a regular-route, fixed-termini certificate. That is the standard required by the statute and the National Transportation Policy to be applied to appellant's irregular-route territorial certificate. It was the standard applied by the Commission below. The interpretation advocated by appellant would require the abandonment of that standard, and is, therefore, invalid.

Thus, the record facts are uncontradicted, there is abundant evidence to support the findings, and the rational basis for the decision reached is clearly set forth. The law requires no more.

Mississippi Valley Barge Line Company v. *United States,* 292 U.S. 282.

The Court below properly found in its Findings of Fact and Conclusions of Law that not only was there a rational basis for the ultimate finding, but that to have found, as appellant desired, would have contravened Sections 206, 207(a) and 208(a) of the Act, and would in effect have been destructive of the Congressional intent which sought to preclude the very type of chaotic destructive competition created by appellant through misuse of its restricted certificate. To find as appellants desired would have been to ignore the restrictive language in the certificate, which specified the type of service permitted. Thus, neither the Commission nor the Court violated any rights of appellant warranted by its definitely restricted certificate allowing only round trip, sightseeing and pleasure tours.

2. The only other question raised by appellant (Statement As To Jurisdiction, Pages 19-25) is that the Commission's cease-and-desist order is invalid for vagueness or indefiniteness because it ordered appellant to abstain from the performance of any transportation of the character found to be beyond the scope of its authority under its certificate. It is claimed that appellant has no way of determining what it may or may not do in the way of transportation under its certificate because of "the inability or unwillingness of the Commission to delineate the elements which do not constitute a tour." It is claimed that appellant is

thereby placed under peril of the heavy penalties provided by Section 222 of the Interstate Commerce Act (49 U.S.C. 322).

Appellant's contention clearly raises no substantial question. The Commission told appellant that it may not lawfully use a territorial, round-trip, sightseeing-or-pleasure-tour certificate as a claimed basis for operations that are in effect regular-route, expeditious point-to-point service. As the court below properly found in its Conclusion of Law No. 6,

> "the Commission has gone to considerable length in advising Bingler of the factors relevant to a determination of its rights under its certificate. It has done so both in terms of the criteria of ordinary regular-route service, which Bingler must avoid, and in terms of the service which Bingler is authorized to carry on."

In the first place, appellant has neither more nor less authority than it had prior to the Commission's Order, for the Commission merely interpreted the meaning of its certificate. It has been put on additional notice that the certificate does not authorize it to engage in ordinary, bare, expeditious transportation between fixed termini, and has been given the benefit of dictionary definitions, case analyses, and explicit enunciation of the governing criteria to assist it in avoiding violations of that certificate. Appellant has been placed in a *better* position to confine itself to lawful operations than it was prior to the Commission's Order.

Secondly, the penal provisions of 49 U.S.C. 322 apply equally to violations of "any term or condition of any certificate" as to violations of a Commission Order. Since the Commission has confined its order to the law-

ful limits, as determined by it, of appellant's certificate itself, any act constituting a violation of the order likewise would be a violation of its certificate, and therefore would be already subject to those penal provisions. Appellant's peril has not been increased by the order. On the contrary, its peril has been *decreased* by the Commission's clear enunciation of the criteria upon which the determination of its lawful scope of operations depends.

Appellant's claim that the failure of the Commission to indulge in speculation with respect to imaginary factual situations not of record, so as to list the factual details of every conceivable operation permissible under the type of authority held by appellant, as well as those prohibited by such authority, is without substance. In the first place, such specification would stultify regulation in this field, and would be analogous to an attempt by the Supreme Court to announce, in a case involving a single set of facts, every conceivable factual transaction which might come within the meaning of "interstate commerce." The varieties of factual interplay of the determinative criteria are infinite. Appellant itself would be among the first to attack any attempt to lay down a precise list of those situations as a definition of the limits of its authority.

The cases cited by appellant (Statement as to Jurisdiction Pages 22-25) which deal with the necessity for the basic findings and a complete statement of the grounds of the Commission's determination are not in point. The detailed factual findings, the subordinate findings and conclusions, and the ultimate findings, as well as the rational basis and legal theory upon which the Commission proceeded are clearly set forth. The criteria which it applied in its expert discretion in determining that appellant's certificate does not embrace

ordinary bare, expeditious, transportation between fixed termini, are likewise fully disclosed.

In short, appellant's contention on this question is identical with the contention so fully demolished by the Court in *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110, 118, affirmed 335 U.S. 875, and other cases cited in the opinion below (132 F. Supp. 798) and needs no further argument before this Court.

CONCLUSION

For the foregoing reasons, the questions upon which the decision of the present appeal depends are so unsubstantial as not to need further argument. The effect upon appellant of being forced to forego any further unlawfully-obtained revenues, and the speculative effect of the interpretation upon others (who were never sufficiently interested to intervene either before the Commission or in the court below), cited by appellant in its Statement As To Jurisdiction, Page 26, do not add any substantiality to the questions upon which this cause depends.

Accordingly, intervenor-appellees respectfully move that the judgment of the District Court be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day made service of the foregoing Motion to Affirm upon the parties of record shown below, in compliance with Paragraphs 1 and 2 of Rule 33 of the Revised Rules of the Supreme Court of the United States, by depositing same in an United States Post Office or mail box, with First Class Postage Prepaid, to the Post Office addresses shown below.

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Washington, D. C.

Dated at Washington, D. C. this ~~First~~ Second Day of November, 1955.

JACK R. TURNEY, JR.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 444

BINGLER VACATION TOURS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the United States and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment, entered June 9, 1955, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The judgment dismissed appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's

order prohibited appellant from conducting certain motor carrier operations found to be unauthorized by appellant's certificate of public convenience and necessity.

STATEMENT

Appellant's certificate authorizes the transportation of passengers and their baggage "in special operations" over "irregular routes" on "round-trip sightseeing or pleasure tours" from New York City and points in three New Jersey counties to points in New Jersey and fourteen other Eastern states. Among the operations conducted by appellant under this certificate were regular bus services between New York City and three New Jersey points—two race tracks and a beach resort at Asbury Park. Although the operations were listed as "Sightseeing Tours" in appellant's tariffs, they were widely advertised as "Special Direct Buses." In each operation passengers were transported to their destination in the forenoon and were returned to New York City later the same day. The price of the tickets included only the transportation service. No guides were employed and only short rest stops were made.

In 1949, on complaint of competing carriers authorized to operate regular service on the three routes, the Commission undertook an investigation of appellant's operations. After appropriate proceedings, the Commission concluded that the operations in question were not authorized by appellant's certificate. Pointing out that "bare expeditious transportation between two points . . . is

the fundamental characteristic of ordinary regular-route passenger-carrier service," the Commission thought it "abundantly clear . . . that round-trip sightseeing or pleasure tours, in special operations, which involve radial or territorial grants of authority, must include something substantial in addition to, or different from, bare expeditious transportation between two points. . . . " 62 M.C.C. at 745. The need for such an "accessorial" service, the Commission stated, becomes progressively important if regularity and frequency are introduced as additional factors. 62 M.C.C. at 746. Finding that none of the three operations is "anything more than bare expeditious round-trip passenger transportation between specified points," the Commission directed appellant to cease and desist from the three operations and also "from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it."[1]

The district court, in a carefully considered opinion by Circuit Judge Biggs, unanimously sustained the order and dismissed appellant's complaint.

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[1] The Commission agreed that the three challenged operations might fall within the term "special operations" as that term is used in the certificate but did not "believe this conclusion to be especially significant" in view of the other restrictive language in the certificate. 62 M.C.C. at 741. For the same reason, the Commission found it unnecessary to consider the regular-irregular character of the challenged operations. 62 M.C.C. at 746.

ARGUMENT

1. Appellant's principal contention (Jurisdictional Statement, pp. 7-19) is that the Commission has misconstrued its own certificate. More specifically, appellant attacks the distinction drawn by the Commission between (a) certificates authorizing tour operations in a certain territory and (b) certificates authorizing tour operations between fixed termini. Certificates of the latter type, the Commission held, may under certain circumstances authorize "bare expeditious transportation," without more, between the points specified in the certificate. 62 M.C.C. at 745. On the other hand, under the test enunciated by the Commission, certificates authorizing *territorial* tour operations do not permit "bare expeditious transportation" between fixed termini unless "something extra and something substantial [*e.g.*, meals, lodging, admissions, or guide service] be added to the bare transportation involved." 62 M.C.C. at 745-746.[2] In appellant's view, there is no rational basis for any distinction between the two types of certificates.

This argument, however, ignores the Commission's obligation under the Act to grant new operating rights only when it is found that the proposed service "is or will be required by the present

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[2] See, *e.g.*, *Red Star Sightseeing Line, Inc., Common Carrier Application*, 1 M.C.C. 521 (1937); *Blue & Grey Sight Seeing Tours, Inc., Common Carrier Application*, 8 M.C.C. 124 (1938); *Resler* v. *Hunter Clarkson, Inc.*, 41 M.C.C. 665 (1943).

or future public convenience and necessity." 49 U.S.C. 307(a). In discharging this obligation, the Commission must of course take cognizance of the special circumstances of each application and fashion its certificate accordingly.[3] Thus, in connection with special operations, certification for expeditious point-to-point tour service may depend in large measure on the availability and sufficiency of regular-route service between the specified points. Where regular-route service is adequate, the Commission may see fit to limit the applicant's certificate to territorial tour operations or to deny the application altogether.[4] If the distinction between the two types of certificates were eliminated,

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[3] See *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480. Appellant's reliance on this decision is misplaced. In issue was the construction of §§ 203(a)(14) and 206(a) of the Act, not the construction of a certificate issued by the Commission. Construing these statutory provisions, the Court concluded "that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers." 315 U.S. at 484-485. The case has no relevance here except insofar as it emphasizes the Commission's broad discretion in fixing the scope of operating certificates.

[4] In fixing the scope of a territorial certificate, the Commission also has broad discretion. See *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 480: "Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant case, it may extend to all points in a part of that area and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission."

"* * * a carrier holding [a territorial certificate], without any fixed responsibility to the public, could concentrate at will on practically any points of its choosing within its authorized territory in direct and destructive competition with the ordinary regular-route carrier upon which the public must depend for its day-to-day basic transportation, in violation of the purport of its certificate and contrary to the public interest and the national transportation policy." 62 M.C.C. at 746. No such problem arises where the certificate authorizes service between two fixed termini "because the authority was specifically granted for that purpose." 62 M.C.C. at 745. The distinction relied upon by the Commission, far from being arbitrary and capricious, provides a wholly reasonable basis for Commission action, as the court below found. And if this be so, judicial review of the Commission's construction of its own certificate is at an end.[5]

2. Appellant further challenges (Jurisdictional Statement, pp. 19-25) the Commission's order insofar as it directs appellant to cease and desist "from the performance of any transportation, in interstate or foreign commerce, of the character found in said report on oral argument to be beyond the scope of the authority heretofore granted to it." This portion of the order, appellant contends, is too vague to be enforced because it "would leave [appellant] in an unwarranted state of un-

[5] *E.g., Malone Freight Lines* v. *United States*, 107 F. Supp. 946, 949 (N. D. Ala.), affirmed, 344 U.S. 925.

certainty concerning the permissible scope of its future operations" and would force appellant "to solve the problem under peril of the heavy penalties provided by section 222 of the Interstate Commerce Act [49 U.S.C. 322]."

Appellant makes no charge of vagueness, it should be noted, as to those portions of the order directing appellant to cease and desist from the designated race track and Asbury Park operations. If these portions of the order are sufficiently precise to enable appellant to understand their impact, appellant should have little difficulty in also understanding that similar conduct—*i.e.*, "bare expeditious transportation" between fixed termini—must be avoided.[6] Particularly is this true in the light of the Commission's detailed exposition of the criteria relevant to a determination of appellant's rights under its certificate. See 62 M.C.C. at 744-746. In any event, appellant's fear of penalties under § 222 for unwitting violations of the order is without substance. Section 222, by its very terms, imposes penalties only on one who "knowingly and willfully" violates a Commission order. Should proceedings be instituted against appellant under § 222, proof that appellant reasonably believed its conduct to be lawful under the order would be a complete defense.[7]

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[6] Compare *Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 118 (S. D. Iowa), affirmed, 335 U.S. 875.

[7] Cf. *Inland Freight Lines* v. *United States*, 191 F. 2d 313 (C.A. 10).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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NOVEMBER, 1955.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 444

BINGLER VACATION TOURS, INC., *Appellant*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the District of New Jersey

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM FILED (1) JOINTLY BY THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION, APPELLEES, AND (2) JOINTLY BY ASBURY PARK-NEW YORK TRANSIT CORP., QUAKER CITY BUS COMPANY, HUDSON TRANSIT LINES, INC., AND NATIONAL BUS TRAFFIC ASSOCIATION, INC., INTERVENOR-APPELLEES

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Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, appellant files this its brief in opposition to the above-described motions to affirm the judgment of the United States District Court. The United States and the Interstate Commerce Commis-

sion will be referred to hereinafter collectively as the Government.

THE INTERVENOR-APPELLEES HAVE MISSTATED THE FIRST QUESTION PRESENTED BY OUR APPEAL

The Government, at page 4 of its motion to affirm, has correctly stated that the first of appellant's two principal contentions is that the Interstate Commerce Commission, hereinafter called the Commission, and the District Court, erred in drawing a distinction between (a) certificates authorizing tour operations in a certain *territory* and (b) certificates authorizing tour operations between fixed termini. The discussion at pages 7 to 19 inclusive, of appellant's Statement as to Jurisdiction was addressed to that question. The intervenor-appellees would confuse the issue, however, by asserting incorrectly that the first of the questions raised by appellant's Statement as to Jurisdiction is "whether the Commission's report and order are rendered invalid as a matter of law by the fact that the Commission distinguishes cases involving applications for *regular-route* and *fixed termini* certificates on the ground that no operational analogy necessarily follows between such a certificate and the *irregular-route territorial* certificate here in issue (62 M.C.C. 745)." (Italics supplied by intervenor-appellees). What these intervenor-appellees seek to do, manifestly, is to leave with this Court the erroneous impression that appellant takes the position that there is no valid distinction between the special operations in round-trip sightseeing or pleasure tours, as conducted by appellant, and the regular-route terminal-to-terminal operations maintained by the conventional regular-route transporter of passengers. We repeat for emphasis the title appearing at the top of page 7 of appellant's

Statement as to Jurisdiction, namely, that "THE LAW DRAWS NO DISTINCTION BETWEEN AUTHORITY TO CONDUCT ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS IN A TERRITORY AND CORRESPONDING AUTHORITY BETWEEN SPECIFIED POINTS." When consideration is given to that question—and to that question only—the discriminatory and unnatural nature of the Commission's attempted distinction becomes obvious. The fallacy and casuistry of the foregoing assertion and reasoning by intervenor-appellees permeate their entire discussion of the first question presented by appellant in its Statement as to Jurisdiction; the foundation being so infirm, intervenor-appellees' whole structure must fall.

THE MOTIONS TO AFFIRM RESOLVE THEMSELVES INTO AN INSISTENCE THAT THE CIRCUMSTANCES WHICH CONSTITUTE A TOUR IN THE CASE OF APPELLANT DO NOT CONSTITUTE A TOUR IN THE CASE OF A CARRIER CONDUCTING SPECIAL OPERATIONS IN ROUND-TRIP SIGHTSEEING OR PLEASURE TOURS BETWEEN SPECIFIED POINTS

Beginning at page 4 of its motion to affirm, the Government seeks to answer the first question presented by appellant's Statement as to Jurisdiction by urging that "in connection with special operations, certification for expeditious point-to-point tour service may depend in large measure on the availability and sufficiency of regular-route service between the specified points." It is significant that in its two decisions in this proceeding the Commission nowhere advanced this argument concerning the "availability and sufficiency of regular-route service between the specified points," but in any event, the Commission's reasons for limiting a given applicant's certificate to specified territory or points cannot possibly alter the in-

trinsic *nature* of the authority granted by it. Otherwise stated, when the Commission grants authority to a carrier (appellant) to conduct special operations in round-trip sightseeing or pleasure tours in a given *territory* and thereafter grants authority to another carrier to conduct special operations in round-trip sightseeing or pleasure tours between *two points in that very territory,* it should not be heard to urge that the nature of the operation to be conducted between those two points by the latter carrier is something different from the nature of that to be conducted by the territorial operator (appellant). Such an attempted distinction is palpably arbitrary and capricious; reasoning so tenuous and so subtle is no more than a vehicle for unjust discrimination. Certainly it is not the "fair and impartial regulation of all modes of transportation" which forms the keystone of the Interstate Commerce Act, to which all the provisions of that Act are made subject.[1] Having granted this

[1] The national transportation policy [49 U.S.C., preceding sections 1, 301, 901, and 1001] reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate

type and measure of authority to appellant, the Commission should not now be permitted to reduce the authority in scope merely because it spreads throughout a territory. To do so is in effect a revocation of a portion of appellant's operating authority in defiance by the Commission of the provisions of section 212(a) of the Interstate Commerce Act [49 U.S.C., section 312][2]

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to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

[2] So far as here pertinent, section 212(a) reads as follows:

Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * *.

THE MALONE FREIGHT LINES CASE IS NOT A PRECEDENT FOR WHAT THE GOVERNMENT HERE SEEKS

The Government, in Footnote 5 at sheet 6 of its motion to affirm, cites *Malone Freight Lines* v. *United States,* 107 F. Supp. 946, 949 (N.D. Ala.), affirmed, 344 U.S. 925. But in that decision the District Court had the following to say:

> "The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law. It is beyond our province to consider 'the soundness of the reasoning by which its conclusions were reached.'"

It is appellant's contention here that the action of the Commission was capricious and arbitrary, that it constituted an abuse of discretion, and that it did violence to established principles of law. The decision in question, clearly enough, constitutes no precedent for what the Government here urges. What we have just said, moreover, furnishes a full answer to the contention by intervenor-appellees at sheet 8 of their motion to affirm (citing *Malone Freight Lines* v. *United States, supra,* and *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, affirmed 324 U.S. 824) that "it is fundamental that the interpretation of its own certificate is peculiarly within the province of the Commission."

THE COMMISSION DID VERY DEFINITELY FIND THAT OPERATIONS IDENTICAL WITH THOSE COMPLAINED OF COULD BE CONDUCTED LAWFULLY UNDER FIXED-TERMINI TOUR CERTIFICATES

We must confess that we are completely at a loss to understand how intervenor-appellees can consistently urge, as they do at sheet 7 of their motion to affirm, that "the Commission did *not* hold that operations identical with those complained of could be conducted lawfully under fixed-tour certificates." We respectfully submit that the intervenor-appellees stultify themselves. Having once contended that the Commission was on sound ground in drawing a distinction between (a) special operations in round-trip sightseeing or pleasure tours in a territory and (b) special operations in round-trip sightseeing or pleasure tours between specified points, it seems almost ludicrous that they should immediately thereafter argue that the Commission did *not* draw such a distinction. They are grasping at straws.

THE DECISION IN THE CAROLINA FREIGHT CARRIERS CASE IS DIRECTLY IN POINT

The Government, in Footnote 3 at page 5 of its motion to affirm, urges that appellant's reliance on *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, is misplaced. It urges this because, it says, "in issue [in the *Carolina Freight Carriers Corp. case*] was the construction of sections 203(a)(14) and 206(a) of the Act, not the construction of a certificate issued by the Commission." But the issue in the case cited was the nature and measure of the service which might be authorized by the Commission to be rendered by the applicant there under the certificate to issue to it under the terms of the "grandfather" clause of section 206(a), just as the issue here is the nature

and measure of the service to be rendered by appellan
under the certificate issued to it under the provision
of the "grandfather" clause of section 206(a). I
each instance the Commission was under obligation t
convert the substance of the statutory provisions int
terms of a fully useable certificate, not to be impaire
by obscure construction. Here, as there, it failed t
do so; it should be taken to task here, just as it wa
there.

THE PENALTIES PROVIDED BY SECTION 222(a) OF THE ACT ARE NOT THE ONLY PENALTIES PROVIDED BY THE ACT FOR VIOLATION OF AN ORDER OF THE COMMISSION

It seems certain that the Government, at sheet 7 o
its motion to affirm, has placed far too broad an in
terpretation upon the provisions of section 222(a)
of the Act;[3] but, however that may be, there is th

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[3] It will not be overlooked that section 222(b) of the Act pro
vides as follows:

> If any motor carrier or broker operates in violation of any
> provision of this part (except as to the reasonableness o
> rates, fares, or charges and the discriminatory characte
> thereof), or any rule, regulation, requirement, or order there
> under, or of any term or condition of any certificate or permit
> the Commission or its duly authorized agent may apply t
> the district court of the United States for any district where
> such motor carrier or broker operates, for the enforcement
> of such provision of this part, or of such rule, regulation, re
> quirement, order, term, or condition; and such court shal
> have jurisdiction to enforce obedience thereto by a writ o
> injunction or by other process, mandatory or otherwise, re
> straining such carrier or broker, his or its officers, agents
> employees, and representatives from further violation of such
> provision of this part or of such rule, regulation, require
> ment, order, term, or condition and enjoining upon it or them
> obedience thereto.

The action of the Commission under section 222(b), be it observed
is not dependent upon a knowing or willful violation.

further fact that appellant would be in peril of proceedings designed to effect revocation of its certificate by reason of possible violation of the Commission's order herein. Such proceedings, on information and belief, are just about to be brought against appellant —based upon its operation, since the decision herein by the District Court, of what it sincerely believes to be tours within the meaning of its certificate.

THE VAGUENESS AND INDEFINITENESS OF THE COMMISSION'S ORDER ARE UNDERSCORED BY THE ABILITY OF OTHER CARRIERS TO CONDUCT THE SAME OPERATIONS, UNDER IDENTICALLY WORDED CERTIFICATES, THAT APPELLANT IS FORBIDDEN TO CONDUCT

The intervenor-appellees, at sheets 10 to 13 of their motion to affirm, strain mightily to make it appear that this decision of the Commission serves to enlighten appellant rather than to leave it in ignorance, as we contend, of its rights and obligations. It seems quite sufficient to comment that the vagueness and indefiniteness of which we complain are made prominent by the fact that the point-to-point carriers in special operations are explicitly authorized to do the very things concerning which appellant is left in such harassing uncertainty.

CONCLUSION AND PRAYER

For all the foregoing reasons, and for those set forth in its Statement as to Jurisdiction, appellant prays that the motions to affirm be denied and that this Court

note probable jurisdiction and assign the proceeding for argument.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day made service of the foregoing brief in opposition to the said motions to affirm by mailing by first-class mail a copy to each of the following attorneys, being all those of record:

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No. 444. BINGLER VACATION TOURS, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the District of New Jersey. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *Wilmer A. Hill* for appellant. *Solicitor General Sobeloff, Assistant Attorney General Barnes* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *James F. X. O'Brien* and *Jack R. Turney, Jr.* for the Asbury Park-New York Transit Corporation et al., appellees. Reported below: 132 F. Supp. 793.